Office-Supreme Court, U.S.
FILED
JAN 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID A. WOLSKI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

REPLY BRIEF FOR PETITIONER

FREDERICK F. COHN
JOEL KERSTETTER
35 East Wacker Drive
Chicago, Illinois 60601
(312) 641-0692
Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF AUTHORITIES

	PAGE
Beck v. Alabama, ... U.S. ....., 65 L.Ed.2d 392 (1980) ..	5
Bollenbach v. United States, 326 U.S. 607, 90 L.Ed. 350	4
McMann v. Richardson, 397 U.S. 759	5
Paul Stevens, *I Can Sell You Anything* (published by Peter H. Wyden, New York, N.Y. 1972, pp. 23-30) ..	5
People v. Anderson, 65 Ill. App. 3d 783, 382 N.E.2d 866	6
People v. Murphy, 72 Ill. 2d 421, 381 N.E.2d 677	6
People v. Ortiz, 22 Ill. App. 3d 788, 317 N.E.2d 763 (1st Dist. 1974)	6
People v. Virgil, 54 Ill. App. 3d 682, 370 N.E.2d 74 (1st Dist. 1977)	6
United States v. Mendenhall, 100 S.Ct. 1870	4
Whiteley v. Warden of Wyoming Penitentiary, 401 U.S. 560 (1971)	2

In The

Supreme Court of the United States

October Term, 1980

DAVID A. WOLSKI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

REPLY BRIEF FOR PETITIONER [1]

The State's response to the crucial issue raised by the petitioner is facially absurd and contrary to the law.

Such a response was unavoidable. The Attorney General of Illinois could not, after considering the facts, the law and the opinion below, state any rational legal argument.

[1] The numerical division of the Argument which follows is dictated by logic and does not correspond to the numbered Points in the Petition.

1.

Petitioner's argument:

> "The magistrate was not advised of crucial facts as to distance, nor was he advised as to locale [because] . . . 'near' is a conclusion" so that the magistrate was not presented with facts necessary to make an independent determination of probable cause. (Pet. pp. 12-14)

Response:

> "The magistrate also had present the officer who discovered the charge slip . . . If the magistrate questioned the meaning of the word 'near' that information would have been available to him." (Res. p. 3)

Respondent's assertion that the validity of an affidavit for search warrant is not tested by what the officer stated therein, but by what the officer *could* have told the magistrate is erroneous.

> "Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. . . . A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, at 565, n. 8.

2.

Petitioner argues that Allegation 4[2] fails to supply necessary temporal relationship between deceased's

---

[2] Allegation 4 reads:

> "That Joy E. Lewis was last observed hitchhiking on Washington Street near Bailey Road in Naperville at 8:15 p.m. on July 21, 1977."

death and the presence in the area of the receipt because the magistrate was not provided information as to how the person knew he saw Joy E. Lewis. To this argument, the State responds:

> "All the facts alleged in the affidavit were derived through police investigation by the affiant or other officers; the source of the information concerning decedent hitchhiking, was a private citizen." (Res. p. 3)

That the source of information in an affidavit is provided by police investigation or obtained from a citizen is insufficient. Although citizen-supplied information need not satisfy the reliability requirement as to the citizen's honesty, the magistrate must be advised of the *source*—underlying facts—of the citizen's opinion. Here, none exists.

3.

Petitioner argues that finding the charge slip, without more, is insufficient to establish probable cause. The State responds:

> "The presence of the charge slip was sufficient to warrant a reasonable man in believing that petitioner was present at the scene of the crime at some point in time and that this linked him to the offense." (Res. p. 4)

The State's response is neither accurate nor logical. The evidence demonstrates only that at some point in time a charge slip belonging to petitioner (an item that could easily blow in the wind) found its way near to the crime scene. This fact alone cannot reasonably lead one to conclude that petitioner was present, or even "near." Even assuming the State's response to be accurate, the fact that petitioner was at the crime scene *at some point in*

time does not supply probable cause to believe that petitioner was "linked to the offense."

There was no probable cause.

4.

Petitioner asserts that he was arrested without probable cause; and the State so concedes. This assertion cannot be diluted by stating that the police officers, who, with drawn guns, forced the defendant into his house, did not consider their seizure of the petitioner to be an arrest. (Res. p. 6) Similarly, the unconstitutionality of petitioner's arrest cannot be justified as essential to the search inside the house. He was arrested outside the house. Furthermore, his arrest and detention by officers with drawn guns cannot be excused by reference to *United States v. Mendenhall*, 100 S.Ct. 1870, where the court found defendant consented to accompany the officers where the police "wore no uniform and displayed no weapons." (100 S.Ct. 1870).

5.

Petitioner asserts that he had a right to a self-defense instruction. He testified that he panicked and struck in self-defense after having been kicked in the groin sufficiently hard to cause bleeding. The State counters with the off-handed assertion:

> "No fair minded jury would have believed that petitioner was in fear at the time he struck the decedent." (Respondent's Brief, p. 8)

Due process does not permit speculation of what a fair minded jury would have done, but requires instructions on the applicable law so the jury can decide what it would have done. *Bollenbach v. United States*,

326 U.S. 607, 90 L.Ed.2d 350; *Beck v. Alabama*, ... U.S. ....., 65 L.Ed.2d 392.

6.

Petitioner's assertion that the Illinois farce or sham test, rejected by ten federal circuits, is inconsistent with this court's interpretation of the Sixth Amendment in *McMann v. Richardson*, 397 U.S. 759 inadequately countered by the response:

> "The Illinois standard is an adequate expression of the rationale behind the Sixth and Fourteenth Amendments and consequently should withstand constitutional scrutiny." (Res. p. 11)

The respondent states no reason why the standard is valid. None exists.

7.

Petitioner's assertion that there exists in Illinois an unconstitutional dual standard—one for private counsel and one for appointed counsel—is not disputed by the empty, meaningless statement:

> "While the cases speak in terms of some distinction between retained counsel and court appointed counsel, *it appears that* a necessity for showing ineffective assistance of counsel is essentially the same in both instances." (Res. p. 12) (Emphasis added.)

"It appears that" is one of those empty terms like "helps" used so frequently in T.V. commercials. It is a "weasel" word used to hide the truth.[3]

---

[3] Paul Stevens, *I Can Sell You Anything* (published by Peter H. Wyden, New York, N.Y. 1972, pages 23-30).

Dicta from two cases indicating no distinction in standards, *People v. Virgil*, 54 Ill. App. 3d 682, 370 N.E.2d 74 (1st Dist. 1977); *People v. Ortiz*, 22 Ill. App. 3d 788, 317 N.E.2d 763 (1st Dist. 1974), does not alter that a different district, the Second Appellate District—the one that decided petitioner's case—believes there is a different standard and so stated:

> "The standard applied in Illinois to judge the competence of retained counsel is whether the caliber of representation was so low as to amount to no representation at all or to reduce the court proceedings to a farce or sham." (App. 14a, Def. Orig. Br.)

and relied on *People v. Murphy*, 72 Ill. 2d 421, 381 N.E.2d 677, *People v. Anderson*, 65 Ill. App. 3d 783, 382 N.E.2d 866, which recognized the existence of a different standard applicable to privately retained counsel than appointed counsel.[4]

Irrespective of dicta of some district courts in Illinois others clearly recognize and apply a different standard in retained counsel and in court-appointed counsel cases.

---

[4] In *People v. Anderson*, the court stated:

> "Defendant urges the court to adopt a uniform standard for both retained and appointed counsel but we do not reach this issue since, in our view, under either standard the claim of incompetent counsel has not been sustained." 382 N.E.2d at 871.

CONCLUSION

As demonstrated above, the Attorney General of Illinois has not been able to present any arguments founded upon law, policy or logic. The Attorney General's inability to present any decent arguments demonstrates the erroneous nature of the opinion below.

Respectfully submitted,

FREDERICK F. COHN
JOEL KERSTETTER
35 East Wacker Drive
Chicago, Illinois 60601
(312) 641-0692
Attorneys for Petitioner